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NO.

in the
Supreme Court
of the
United States

JOSEPH ALBERT MAHANNA,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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QUESTION PRESENTED

THE PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, CONTRARY TO *GEDERS V. UNITED STATES*, 425 U.S. 80 (1976), WHEN THE TRIAL COURT ORDERED HIM NOT TO CONSULT WITH HIS ATTORNEY DURING A SEVENTEEN (17) HOUR OVERNIGHT RECESS.

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Joseph Albert Mahanna, prays a Writ of Certiorari issue to review a final judgment of the Fourth District Court of Appeal of Florida affirming the Petitioner's conviction in the Circuit Court of the Seventeenth Judicial Circuit of Florida.

JUDGMENT AND OPINION OF THE COURT BELOW

In a per curiam order without a written opinion, the Fourth District Court of Appeal of Florida affirmed the Petitioner's conviction in the Circuit Court of the Seventeenth Judicial Circuit of Florida. The Florida Rules of Appellate Procedure absolutely prohibit an appeal to, or petition of certiorari to the Florida Supreme Court if there is no written opinion by the District Court. Accordingly, the Petitioner appealed his conviction to the highest court allowed under the Appellate Rules of Procedure of Florida.

JURISDICTION OF THIS COURT

This Petition is filed within sixty (60) days of the Fourth District Court's denial of the Petitioner's petition for rehearing on July 12, 1982.

The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1257(3) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL AMENDMENTS INVOLVED

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

STATEMENT OF THE CASE

The Petitioner was charged in three (3) separate Informations viz: (1) Circuit Court Case No. 80-500CF with the offense of Forgery of a Credit Card Receipt; (2) Circuit Court Case No. 80-1909CF with the offenses of Grand Theft by Unlawful Use of a Credit Card and Forgery of a Credit Card Receipt; and (3) Circuit Court Case No. 80-5319CF with the offense of Forgery of a Credit Card Receipt.

The three (3) Informations were consolidated for trial. After a jury trial, the Petitioner was found guilty of all the aforementioned charges. The trial court sentenced the Petitioner to a total period of incarceration of ten (10) years followed by fifteen (15) years probation.

The Petitioner's appeal to the Fourth District Court of Appeal of Florida of the issue raised herein was denied without opinion. Accordingly, there is no opinion included herein explaining the Appellate Court's reasoning.

REASONS FOR GRANTING THE WRIT

On the third day of trial when the trial recessed for the evening, the presiding judge ordered the Petitioner not to consult with his attorney during the overnight recess. This overnight recess was the last significant and lengthy recess before the last day of the trial. The following day, the Petitioner testified, the jury charge conference was held, closing arguments were heard,

and the jury retired to deliberate. The pertinent facts are as follows:

The trial began the morning of November 3, 1980. On the afternoon of November 4th, the Petitioner began calling witnesses on his behalf. Seven (7) witnesses testified for the defense. At approximately 5:10 p.m., counsel for the Petitioner informed the court that his final witness would be the Petitioner. He requested that the court recess so that the Petitioner could begin testifying the next morning. The court denied the request, and the Petitioner began testifying.

At approximately 6:00 p.m., the court recessed for the day. The court stated the trial would begin the next morning at 11:00 a.m., seventeen (17) hours later. Upon recessing, the court ordered the Petitioner not to discuss the case with his counsel. Petitioner's counsel acquiesed to the order. However, the record is silent as to whether the Petitioner agreed to waive his right to speak with his counsel during the overnight recess. Nowhere in the transcript did the Petitioner affirmatively waive his right to consult with and to seek the advice of this counsel during the seventeen (17) hour overnight recess.

The trial resumed the next morning shortly after 11:00 a.m. Counsel for the Petitioner stated that he had abided by the court's previous instruction, but that it had been necessary for him to speak with the Petitioner about trial strategy and the progression of the trial. The court agreed to allow counsel to speak with the Petitioner for a few moments. Nowhere in the record did Petitioner personally agree to this procedure. The

Petitioner never affirmatively waived his right to consult with his attorney during the previous overnight recess.

The law is clear that the right to counsel is a personal right that can only be waived by the individual. A waiver of the right to counsel must be intelligently and understandingly made, and will not be presumed from a silent record. *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942); *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Swenson v. Bosler*, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967); *Doughty v. Maxwell*, 376 U.S. 202, 84 S.Ct. 702, 11 L.Ed.2d 650 (1964); *Boykin v. Alabama*, 395 U.S. 238, 89, S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Boyd v. Dutton*, 405 U.S. 1, 92 S.Ct. 759, 30 L.Ed.2d 755 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1408, 31 L.Ed.2d 394 (1972); and *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). There was no *personal* waiver of the right to consult with his counsel by the Petitioner.

The Petitioner was on trial for eight (8) felony charges, each stemming from a different set of circumstances. The Petitioner was the last witness to testify. At the conclusion of his testimony, after a brief jury instruction conference, closing arguments immediately began. The seventeen (17) hour, overnight recess, before the last day of trial, was the last significant and lengthy time period in which the Petitioner could discuss his case with counsel prior to jury deliberations. Aside from his testimony, there was needed discussion of trial strategy concerning jury instructions and closing argument. The Petitioner should have been afforded the opportunity to discuss with his counsel those things.

Particularly, in view of the fact that his counsel waived all instructions on lesser included offenses.

The Petitioner would rely upon *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), which is directly on point. The court stated:

> It was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.
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> 425 U.S. at 88, 96 S.Ct. at 1335.

See also *United States v. Conway*, 632 F.2d 641, at 645 (5 Cir. 1980) wherein the court ruled, ". . . we hold that depriving a criminal defendant of the right to consult with counsel during the Court recesses—regardless of how brief the recesses may be—violates the constitutional right to effective assistance of counsel." *Conway* involved a luncheon recess during cross-examination of the defendant.

CONCLUSION

By its decision, the Florida Appellate Court refused to follow, or deviated from this Court's previous pronunciation that a defendant's right to counsel shall not be hindered, restricted, or prohibited during an overnight recess of his trial.

Respectfully submitted,

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